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No. [redacted] 59

IN THE

Supreme Court of the United States

October Term, 1954

ANTHONY J. WILKOWSKI
Appellant,

v.

PHILIP A. HART
Lieutenant Governor
Of the State of Michigan
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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IN THE

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JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of the State of Michigan, entered on January 28, 1955, denying a petition for peremptory writ of mandamus filed by appellant against appellee, seeking to compel Appellee to forthwith lawfully administer the oath of office required by the Constitution of the State of Michigan, to appellant, as the duly elected senator of the Second ~~Con-~~ SENATORIAL ~~gressional~~ District of the State of Michigan.

The appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

Below, the cause was filed in the Supreme Court of the State of Michigan as an original action.

The opinion of the Court below, denying the petition for writ of mandamus, has not yet been reported.

The unreported opinion of the Court below is attached hereto in Appendix A, infra, p.....

JURISDICTION

The cause below originated as follows:

The action below was instituted by appellant as an original action in the Supreme Court of the State of Michigan.

The form of action was petition for peremptory writ of mandamus.

Below, appellant relied upon the Constitutional provision set forth in Constitution, State of Michigan, 1908, Article 5, Section 5, as follows:

> Sec. 5. Each senator and representatives shall be a citizen of the United States and a qualified elector of the district he represents, and his removal from the district shall be deemed a vacation of the office.

And, Article 5, Section 15, as follows:

> Sec. 15. Each house, except as otherwise provided in this constitution, shall choose its own officers and determine the rules of its proceedings, but shall not adopt any rule that will prevent a majority of the members elected from discharging a committee from the further consideration of any measure. Each house shall judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of the members elected, expel a

> member. The reasons for such expulsion shall be entered upon the journal, with the names of the members voting upon the question. *No member shall be expelled a second time for the same cause.*

And, Laws of the State of Michigan, (Stat. Ann. 1952 Rev. Sec. 263 (L. C. 1948, Sec. 4.85), as follows:

> Oath of member, who may administer. Sec. 4. The oath of office of any member or officer of the senate or house of representatives, may be administered by, and taken and subscribed before the chancellor, any justice of the supreme court, the lieutenant governor, the president pro tempore of the senate, or the speaker of the house of representatives.

The proceeding below came into being when appellant, a duly qualified Senator-elect, sought to take the oath of office at an organizational meeting of the Senate elect, in the State Capitol, January 12, 1955; and again January 17, 1955, at a regular meeting of the State Senate at the State Capitol; and was refused the right to take the oath of office or to take the office of Senator, for the reason appellant had been convicted of a felony in the State of Michigan on February 14, 1936; the appellee, presiding officer of the Senate elect at the said organizational meeting, having determined Section 6, Chapter 4, of Act 351 of Public Acts of 1925, as amended, being Section 6.676 Mich. Stat. Ann. Section 3339 Compiled Laws of 1929, barred appellant from taking office.

The statute referred to immediately above reads as follows:

> If any candidate for any public office at any election in this state shall be convicted of a felony, as defined in this act, the election of such candidate, if he has been elected, shall be void; and if he shall enter into the office for which he was elected, an in-

> formation in the nature of a quo warranto, to oust him from such office, may be filed in the Supreme Court or the proper circuit court

The judgment sought to be reviewed is January 28, 1955. Entry is January 28, 1955. The Notice of Appeal was filed February 2, 1955. The Notice of Appeal was filed in the Supreme Court of the State of Michigan.

Jurisdiction to review is conferred upon this Court by 28 U. S. C., section 1257 (2).

Below, appellant contended that the qualifications for the office of State Senator were those provided for in Constitution, State of Michigan, Article 5, Section 5, supra; and that the subsequent legislative act, Section 3339 Compiled Laws, 1929, setting up an additional qualification was invalid and unconstitutional; and, in general terms, below, appellant asserted that deprivation of his office upon the authority of an unconstitutional statute violated rights conferred upon him by the Constitution of the United States.

In *McPherson v. Blacker*, 146 U S 1, 13 S. Ct. 3, 36 L. Ed. 869, 873, this Court said:

> • • • the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws, and its validity was sustained.
>
> Boyd v. Thayer, 143 U. S. 135 (36:103). And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U.S. 672 (26:271).

In *Taylor v. Beckham*, 178 U. S. 548, 20 S. Ct. 890, 44 L. Ed. 1187, 1198, this Court said:

> • • • where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined *in accordance with, the state Constitution and laws,* the cases must necessarily be rare in which the interference of this court can properly be invoked. (Underscoring supplied).

In the instant litigation the claim is that the statute relied upon by the Court below is unconstitutional and repugnant to the Constitution of the United States.

Again, in *Taylor v. Beckham, supra,* this Court at page 1198, discussing controversies relating to election of state officers, referred to cases in which this Court had assumed jurisdiction—observing:

> In each of the foregoing cases the determination of the right to the offices in dispute was reposed in the judicial courts, and no question was expressly considered by this court as to whether the right to a public office of a state was or was not protected by the 14th Amendment.

Ergo, considerations of constitutional rights and privileges aliunde the property right protected by Amendment 14 will suffice to bring a dispute relative to a state office within the orbit of the jurisdiction of this court.

The federal statute found in 8 U. S. C. Section 43, reading as follows, seems to be applicable to the instant claim of repugnancy to a federal law:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

jured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED

1. Where by Constitutional declaration qualifications for office are specifically enumerated—does a statute subsequently enacted, adding new qualifications to such office bear the stigmata of unconstitutionality?

2. Where one possessing each and every one of the qualifications demanded by the Constitution of the State is elected to office and refused or denied the right to serve because of a statute setting up new and different qualifications; and is then re-elected at a succeeding regular election, only to be again denied the right to take office, is the provision in the statute setting up the additional qualifications—on the second event—repugnan-t to the Constitutional provision as follows:

   No member shall be expelled a second time for the same cause?

3. Does the action of a state official which is the direct cause of such denial of the right to take office entitle the official-elect to seek redress under U. S. C. Title 8, section 43?

4. Where one possessing each and every of the qualifications demanded by the Constitution of the State is elected to office and refused and denied the right to serve because a statute enacted subsequently to the adoption of the Constitution provides that one convicted of a felony may not hold public office; and the elected person has been twice prior to the instant ocasion elected to the same office and served out his

time—this subsequent to the said conviction—does the aforesaid election and service, operate in the nature of res adjudicata?

STATEMENT OF THE CASE

Appellant is a citizen of the United States. He was elected as State Senator in the State of Michigan, November 2, 1954. He possessed each of the constitutional qualifications for said office.

In 1929 the State Legislature passed an act providing that convicted felons should not be eligible for the said office.

Appellant was convicted of a felony in 1936.

In 1944 appellant was elected as State Senator and served the 1945-46 term of office.

In 1948 appellant was elected as State Senator and served the 1949-50 term of office.

In 1950 appellant was elected as State Senator and denied the right to take office because of the aforesaid felony conviction.

In 1954 appellant was elected as State Senator and denied the right to take office because of the aforesaid felony conviction.

In 1936 appellant was elected as State Senator; served his term of office in absentia, no person being elected in his stead while he was incarcerated during 1937 and 1938.

Following his election in 1954, appellant in January, 1955, journied to Lansing, Michigan, capitol to attend the organizational meeting of the Senate-elect.

The appellee presided at such meeting.

On roll call of the Senators-elect, appellant's name was called and he answered as present.

Thereupon one Senator-elect, a certain Coleman, moved appellee not to administer the oath to appellant at that time.

Appellee acted favorably on such motion; but administered the oath to the other Senators-elect.

Five days later appellant again appeared before the Senate and sought to be administered the oath of office. This request was likewise denied, and for the same reason.

Thereupon appellant brought original action in the Supreme Court of Michigan for a peremptory writ of mandamus requiring appellee to administer to him the oath of office.

The said court denied his petition for said writ and appellant noted this appeal.

Below there were no proceedings in the nature of a trial.

Appellant filed his petition for the writ supported by a brief. See Appendix B and Appendix C.

Appellee, through counsel, filed brief Opposing Petition for Writ of Mandamus. See Appendix D.

Appellant filed Reply to Defendant's Brief. See Appendix E.

These appendices present, in toto, the contentions and averments of the parties in their litigation below; and it would appear that their presentment in the Appendix, only, will save this Court and opposing counsel time and effort.

In his pleadings below appellant through the medium of paragraph 29 of his Petition For Writ Of Mandamus raised his federal question as follows:

29. Plaintiff further says that to deny him the right to take the office to which he was duly elected would be taking his property without due process of law *and* in violation of the rights accorded him in such respect by the Constitution of the United States * * *. (Underscring supplied).

And from this it appears that appellant did not place his sole assertion of a federal question upon the proposition that a property right was involved.

There was no express response to this part of appellant's pleading.

The Judgment of the Court, denying the relief sought, does not expressly refer to the federal question, but the action of the Court below is an explicit and complete holding of the validity of the act notwithstanding applicable federal constitutional and statutory provisions.

THE QUESTIONS ARE SUBSTANTIAL

As To Legislative Amendment Of Constitutional Qualifications For State Legislature:

A state constitution is not a grant, but a limitation on legislative power; and the State Legislature may not enact any law expressly or inferentially prohibited by the Constitution.

In McPherson v. Blacker, 146 U.S. 1, 36 L. Ed. 869, 878, this Court said:

> * * * The 14th Amendment provides:
>
> 'Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

'Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial offices of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the numbers of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.'

* * * The first section of the 14th Amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the State having attained majority and being a citizen of the United States, then the basis of representation to which each State is entitled in the Congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, *and so of the right to vote for* representatives in Congress, the executive and judicial officers of a State, or the *members of the legislature* thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State.

Appellant argues that in the instant situation the right to vote is abridged when the vote cast is declared to be a nullity because in favor of a candidate possessing all constiutional qualifications for office; but lacking an additional qualification imposed by statute. Pursuing that contention to its logical and ultimate conclusion that means that the reduction mentioned in Amendment 14 must be effectuated in Michigan in the ratio of votes cast for appellant to total numbers of male citizens of required age in the state.

And if, possibly, the action of the legislature complained of can produce such a result there is a definite substantial federal question of constitutional proportions.

Title 8, section 43—and also Amendment 14—were designed, primarily, to relate to persons freed by means of the Civil War.

However applying the act to appellant we find:

1. Appellee under color of statute;

2. Caused appellant to be rejected for elective office;

3. That right to hold public office is a privilege, right and immunity secured appellant by the Constitution and laws of the United States and the Constitution and laws of the State of Michigan;

4. That appellant sought to redress such grievance in the judicial proceeding instituted below.

Is there any thing in the said statute which says appellant may not thus institute a proceeding for redress?

If the statute does not by its terms prohibit this effort to seek judicial redress, how can it be argued the action taken does not involve a substantial question under the laws of the United States.

It seems pertinent to observe that the term "rights", much used and abused in popular parlance, does not mean a status or condition operating on negroes, only.

Absent any remote intention to be frivolous it is fair ot state that white also have rights; and that they should have equal opportunity for enforcing and redressing them with blacks.

James M. Beck, in his monograph entitled The Vanishing Rights of the States, being concerned with the same problem as here agitated—but with respect to the Federal Legislature—succinctly stated the answer to the question thus, on pages 50 and 51.

* * * the act which would justify his expulsion, must have taken place since his election. What he did prior to his election and qualification has been passed upon by the people of his State. In a political sense it is res adjudicata. A candidate for the Senate might have been guilty of embezzlement before his election, but the right of the people of that State to send an embezzler to the Senate, if it sees fit, is clear. Such decision is the sole right of the State. * * *.

The Supreme Court has said, in the case of U.S. v. Ballin, 144 U.S. 1:

> 'The Constitution empowers each house to determine times and rules of proceedings. It may not by its rules ignore constitutional restraints, or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.'

To permit the Senate to expel a Senator on the ground that, before his election, he had been either a fool or a knave, would revolutionize our theory of constitutional

government. All this had been passed upon before the Constitution was framed in the great John Wilkes controversy.

When it is considered, in the instant situation, that in addition appellant had been twice elected and twice served as State Senator prior to his last election; and when it is considered that the people of the State continuously elected and re-elected him notwithstanding his conviction it becomes apparent that the grievance of which judicial complaint is made is substantial and within the jurisdiction of this Court.

When the Legislative body created by the Constitution of the State seated appellant prior to the rejection of which complaint is made that body decided that appellant was qualified with respect to any condition existing prior to his elections heretofore. The present Senate may not by fiat set aside the prior decision. Withal the identity of membership may change with the times, the identity of the Senate as a governmental body does not. That body has expressly stated appellent is qualified for office and that the citizens of the State have the right to vote appellant into the office of State Senator.

The righs of the voters under Amendment 14; and of apellant under Amendment 14 and 8 USC 43, thus violated are of such substance as to require this Court to review and reverse the Opinion and action of the Supreme Court of the State of Michigan in this litigation.

Respectfully submitted,

JOSEPH A. McMENAMIN,
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Appeals Building,
426 Fifth Street, N.W.,
Washington 1, D.C.

STATE OF MICHIGAN

IN THE SUPREME COURT

January 28, 1955

ANTHONY J. WILKOWSKI,
Plaintiff,

—vs.—

PHILIP A. HART,
LIEUTENANT GOVERNOR
OF THE STATE OF MICHIGAN,
Defendant.

APPENDIX A

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN HELD AT THE SUPREME COURT ROOM, in the CAPITOL, IN THE CITY OF LANSING, on the twenty-eighth day of January in the year of our Lord one thousand nine hundred and fifty-five.

Present the Honorable

LELAND W. CARR,
Chief Justice
HENRY M. BUTZEL
TALBOT SMITH
EDWARD M. SHARPE
AMERSON R. BOYLES
NEIL E. REID
JOHN R. DETHMERS
HARRY F. KELLY,
Associate Justices

ANTHONY J. WILKOWSKI,
Plaintiff

vs. 46460 1/2

PHILIP A. HART, Lt. Governor
of the State of Michigan,
Defendant

This matter coming before the Court on the petition of plaintiff for a peremptory writ of mandamus requiring defendant to administer to plaintiff the Constitutional oath of office required to be taken by members of the State Senate, or in the alternative for an order to show cause why such writ should not issue, and defendant having filed objections to the granting of such writ, and briefs of counsel having been filed,

Therefore, IT IS ORDERED upon due consideration of the matter, that the application be, and it hereby is, denied for the following reasons:

1. That a writ of mandamus against a public officer of the State may not issue except to require the performance of a clear legal duty on the part of such officer, and it does not appear from plaintiff's application that any such duty is owing in the instant case by defendant to plaintiff.

2. Because plaintiff's petition shows that he has heretofore taken his official oath of office as the duly elected Senator from the 2nd Senatorial District of the State before an official duly authorized to administer such oaths, which said plaintiff in his petition asserts was a valid oath and as such qaulified him for said office. In view of such claim the administering of a 2d oath would be but an idle ceremony, and the burden is on petitioner to show his right to the relief sought.

3. Because it does not appear from plaintiff's petition that the issuance of a writ of mandamus against defendant, if deemed proper and within the jurisdiction of the Court, would accomplish the object sought by plaintiff or be of benefit to him.

4. Because plaintiff's petition is effect challenges the action of the Senate of the State of Michigan acting in its Sovereign capacity as part of the law-making department of the State Government, and under the settled law of this State the Court is without authority to direct or control such action by a writ of mandamus. Sutherland v. The Governor, 29 Mich 320; Auditor General v. Board of Supervisors of Menominee County, 89 Mich. 552; City of Jackson v. Commissioner of Revenue, 316 Mich 694; Detroit Board of Education v. Superintendent of Public Instruction 319 Mich 436.

A True Copy

APPENDIX B

STATE OF MICHIGAN
IN THE SUPREME COURT

ANTHONY J. WILKOWSKI,
Plaintiff
vs.
PHILIP A. HART, Lt. Governor of the State of Michigan,
Defendant

No. .....

PETITION FOR WRIT OF MANDAMUS

Your plaintiff says:

1. That he is a resident of the City of Detroit, County of Wayne, State of Michigan.

2. That defendant, Philip A. Hart, is the Lieutenant Governor of the State of Michigan and President of the State Senate.

3. That on the 22nd day of November, 1954, plaintiff was certified by the Wayne County Board of Canvassers as the candidate receiving the highest number of votes cast for the office of State Senator by the duly qualified electors in the Second Senatorial District located in the County of Wayne, State of Michigan, and a certificate of election, duly signed by Edward Branigin, County Clerk for the County of Wayne, State of Michigan, the Secretary of said board, was issued and delivered to plaintiff, the original of which is hereto attached and marked Exhibit I.

4. That on the 12th day of January, 1955, plaintiff, as senator-elect, for the Second Senatorial District of Michigan, did present himself in the Senate Chamber in the

State Capitol Building in Lansing, Michigan for the purpose of taking the prescribed oath of office for State Senator of the Second Senatorial District of Michigan, in accordance with the provisions of the Constitution and laws of the State of Michigan.

5. That plaintiff did possess, in entirety, all the qualifications for the office of State Senator, as required by the Constitution of the State of Michigan.

6. That on the aforesaid date and time and at said place, defendant, Philip A. Hart, Lieutenant Governor of the State of Michigan, did preside at an organizational meeting attended by the Senators-elect from their respective senatorial districts of the State of Michigan, for the purpose of organizing the Michigan State Senate for the regular session of 1955, in accordance with the Constitution and statutes of the State of Michigan.

7. That pursuant to law, defendant did call the aforesaid organizational meeting to order and Fred J. Chase, Secretary of the last preceding Senate, acted as Secretary of said meeting.

8. That the said defendant did authorize the secretary to call the roll, by name, of the Senators-elect, which names had been duly certified by the Secretary of State of the State of Michigan, on the 28th day of December, 1954. The name of plaintiff was called as the certified senator-elect from the Second Senatorial District of the State of Michigan, and plaintiff, Anthony J. Wilkowski, answered present to the roll call of his name.

9. That immediately after the roll call of the Senators-elect, Senator-elect Creighton R. Coleman made the following motion:

Mr. Coleman:

"Mr. President, Section 15 of Article 5 of the Constitution provides that * * * Each house shall judge of the qualifications, elections and returns of its members * * *"

"At the proper time this afternoon a resolution relative to the qualifications and seating of Senator-elect Anthony J. Wilkowski will be offered.

"Pending the filing of that resolution, I move that the oath of office be not administered to said Anthony J. Wilkowski and that he not be permitted to occupy his seat until such time as the Senate shall judge of his qualifications."

10. That during a debate on said motion plaintiff did approach the Chair and did present to the Secretary of the said organizational meeting an oath of office, the composition of which was in exact conformity with the oath as required by the Constitution of the State of Michigan, Article 16, Section 2; that plaintiff did take the prescribed oath on the 12th day of January, 1955, in a Committee Room of the Michigan State Senate before a Notary Public and before the aforesaid organizational meeting was called to order.

11. That on motion of said Senator-elect Coleman, the members constituting the said organizational meeting, by majority vote, did reject the said oath of office presented by plaintiff.

12. That the aforesaid motion of said Senator-elect Coleman, that the oath of office be not administered to plaintiff, was then submitted by said defendant, the Lieutenant-Governor, to the members constituting the organizational meeting and the said motion was carried by majority vote of the members thereof.

13. That the aforesaid proceedings were duly reported and are contained in the journal of the Senate under date of January 12, 1955, on pages 6, 7 and 8 of said journal, a copy of which is hereto attached and marked Exhibit II, and by this reference made a part hereof.

14. That defendant, as presiding officer of said organizational meeting, did then and there call the Senators-elect in groups to the rostrum of the Senate and did then and there administer to them the required constitutional oath of office.

15. That the said defendant did cause the name of plaintiff, Anthony J. Wilkowski, not to be called, in accordance with the aforesaid motion, and plaintiff was denied his legal right to take his oath of office before the defendant and Lieutenant Governor.

16. That after the aforesaid Senators-elect had taken the prescribed oath and had entered upon their duties of office, the following resolution was introduced in the Senate:

"*Senate Resolution No.* 1.

A resolution to declare a vacancy in the Second Senatorial District. Whereas, Anthony J. Wilkowski has been certified by the Secretary of State as Senator-elect from the Second Senatorial District of Michigan for the term beginning January 1, 1955; and

Whereas, Said Anthony J. Wilkowski was sentenced to the State's Prison for the State of Michigan for a term of four to five years on the 14th of February, 1936 for the felonious and fraudulent alteration of election ballots, the conviction for which was upheld by the Supreme Court of this State (278 Michigan, 281) and from which conviction no appeal is pending, the same being filed in all respects,

and upon which conviction said Anthony J. Wilkowski served time in the Michigan State Penitentiary; and

Whereas, The people of the State of Michigan through and by the Legislature with the approval of the Governor, enacted the following statute, to-wit: Section 6, Chapter 4 of Act 351 of the Public Acts of 1925, as amended, being Section 6.676 Mich. State. Ann. Section 3339 Compiled Laws of 1929, as follows:

> 'If any candidate for any public office at any election in this state shall be convicted of a felony, as defined in this act, the election of such candidate, if he has been elected, shall be void; and if he shall enter into the office for which he was elected, an information in the nature of a quo warranto, to oust him from such office, may be filed in the Supreme Court, or the proper circuit court.'; and

Whereas, 'Each House of the Legislature shall judge of the qualifications, elections and returns of its members,***' in accordance with Section 15, Article V of the Constitution for the State of Michigan; and

Whereas, Each member of this Senate represents not only the persons of the particular district from which he is elected but likewise represents and acts for the people of the State of Michigan as a whole; and

Whereas, It is fundamental that any person who has been decreed unfit to hold public office by the statutes of this State and who has been convicted under the democratic form of government by a jury of his peers and accorded every safeguard of his rights and liberties on appeal and by due process of law, should not participate in the making of laws, which mandates and penalties for disobedience thereof, and particularly so where the violation, as in the case of Anthony J. Wilkowski, desecrated

the purity of elections and the sanctity of the ballot and breached the public trust imposed in him; now therefore be it

Resolved, That Anthony J. Wilkowski be declared as unfit and unqualified to hold the office of State Senator and that the seat from the Second Senatorial District of Michigan be declared vacant."

18. That on the 17th day of January, 1955, plaintiff again presented himself at the Senate chamber and requested the defendant to administer to plaintiff the oath of office; that the defendant did refuse to administer the oath because of the action of the Senators-elect and the Senators on the motion and resolution as aforesaid.

19. That the Constitution of Michigan (Art 16 Sec 2) prescribes the form of the oath as follows:

> "*Oath of Office.* Sec. 2. Members of the legislature and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability.' No other oath, declaration or test shall be required as a qualification for any office or public trust."

20. The laws of the State of Mich. (Stat Ann 1952 Rev sec. 263 (L.C. 1948 sec. 4.85) further provide for the taking of oaths by senators as follows:

> "*Oath of member, who may administer.* Sec. 4. The oath of office of any member or officer of the senate or house of representatives, may be administered by, and taken and subscribed before the

chancellor, any justice of the supreme court, the lieutenant-governor, the president pro tempore of the senate, or the speaker of the house of representatives."

21. The Constitution of the State of Michigan (Art 5 Sec 15) further provides that the Senate shall be the judge of qualification, elections and returns of its members, as follows:

> "*Same (Senate and house); powers.* Sec. 15. Each house, except as otherwise provided in this constition, shall choose its own officers and determine the rules of its proceedings, but shall not adopt any rule that will prevent a majority of the members elected from discharging a committee from the further consideration of any measure. Each house shall judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of all the members elected, expel a member. The reasons for such expulsion shall be entered upon the journal, with the names of the members voting on the question. No member shall be expelled a second time for the same cause."

22. The Constitution sets forth explicitly the qualifications a person must have to be elected Senator. It requires that a Senator shall be a citizen of the United States and a qualified elector of the district he represents, and that his removal from the district shall be deemed a vacation of his office (Const 1908, art 5 sec 5).

As a qualified elector a Senator must be above the age of 21 years (Const 1908 art 3 sec 1). No person shall be eligible to be a Senator who shall hold any office under the United States or this state or any county office, except Notaries Public, officers of the militia and officers elected by townships (Const 1908 art 5 sec 6). Further requirements for eligibility for the office of Senator with rela-

tion to his ability to hold other office is provided by the Constitution (Const 1908, art 5 sec 7).

23. The Constitution of the State of Michigan contains no provision disqualifying a person from being elected State Senator by reason of any former conviction of a criminal offence, nor does the Constitution contain any provision giving the Legislature power to require further qualifications for the office of State Senator.

24. Your plaintiff further says that at no time during said organizational meeting was an objection made by any Senator-elect that plaintiff did not possess the qualifications required by the Constitution; that the motion of Senator-elect Coleman stated that at a future time a resolution relative to the qualifications and seating of plaintiff would be offered and that pending the filing of said resolution the oath of office be not administered to plaintiff; that at no time during the said organizational meeting did said body pass judgment on any qualifications of plaintiff required by the Constitution of Michigan.

25. That in the absence of any specific charges relating to the qualifications of plaintiff, it was the legal duty of defendant to administer the oath of office to him.

25. That, at the time of said proceedings in said organizational meeting, the membership of said body had not been aministered the oath of office and therefore did not possess the constitutional prerogative of judging the qualifications of its members; that the specific reason of convening was for the purpose of organizing the Senate, in accordance with the provision of the statute, which provided that no other business shall be in order until they had completed such organization.

26. Your plaintiff further says that the passage of the Senate resolution wherein plaintiff was declared unfit and unqualified to hold office of State Senator was an un-

constitutional act in that it did unlawfully require plaintiff to meet a qualification not required by the Michigan Constitution; that the action of the Senate in adding a qualification for office not prescribed by the Constitution was a nullity and said action was absolutely void.

27. Plaintiff, therefore, represents that, the action of the Senate being a nullity, he now has a clear legal constitutional right to have the oath of office administered to him.

28. Plaintiff further says that the oath of office taken by him before the Notary Public, which is now in the possession of the Clerk of the Senate, was a valid and legal oath that qualified him for office.

29. Plaintiff further says that to deny him the right to take the office to which he was duly elected would be a taking of his property without due process of law and in violation of the rights accorded him in such respect by the Constitutions of the United States and the State of Michigan.

WHEREFORE your plaintiff prays that a Writ of Mandamus may be issued out of and under the seal of this court, directed to Philip A. Hart, Lieutenant Governor of the State of Michigan, commanding him forthwith to lawfully administer the oath of office required by the Constitution of the State of Michigan to Anthony J. Wilkowski as he duly elected senator of the Second Congressional District of the State of Michigan.

PHILIP J. NEUDECK,
Attorney for Plaintiff
FRANK P. NEATON,
Attorney for Plaintiff
Addresses:
925-31 Dime Building
Detroit, Mich. Wood. 3-7791

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

On this 18th day of January, 1955, before me a Notary Public in and for said County and State, appeared the above plaintiff, Anthony J. Wilkowski, who being by me duly sworn did say that he has read the foregoing petition by him subscribed and knows the contents thereof and that the same is true of his own knowledge except those matters which are therein stated to be upon information and belief and as to those other matters he believes it to be true.

LILLIE DILLON,
Notary Public, Wayne County, Michigan
My commission expires August 8, 1958.

CERTIFICATE OF ELECTION

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

I, EDGAR M. BRANIGIN, Clerk of Wayne County and Clerk of the Circuit Court in and for said County, do hereby certify that as a result of the election held in said County on the 2nd day of NOVEMBER, 1954, ANTHONY J. WILKOWSKI was duly elected to the office of STATE SENATOR—SECOND DISTRICT, for the term ending December 31, A. D. 1956, as appears from the certificate of determination of the Board of Canvassers, now on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Detroit, this 22nd day of November, A. D. 1954.

(SEAL) EDGAR M. BRANIGIN,
County Clerk.

APPENDIX C

STATE OF MICHIGAN
IN THE SUPREME COURT

ANTHONY J. WILKOWSKI,
Plaintiff

vs.

PHILIP A. HART, Lt. Governor
of the State of Michigan,
Defendant

PLAINTIFF'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

At the outset we wish to make our position clear. We agree that the Senate has the power to judge qualifications, elections and returns of its members. The courts have no power or jurisdiction to interfere with the Senate when it judges the qualifications and elections of its members. It is the claim of the plaintiff that the qualifications for senator are prescribed by the Constitution of the State of Michigan; that the Senate cannot add to or vary these qualifications in any manner; that the action of the Senate in the case of plaintiff did not constitute an exercise of its constitutional power of judging the qualifications of a member but was an unlawful attempt to add a new qualification other than those prescribed in the Constitution. The action of the Senate in passing a resolution declaring plaintiff unqualified for office, because of his conviction on a criminal offence some eighteen years ago, pinpointed its legal position in this matter. The Senate did not judge or purport to judge the plaintiff upon any constitutional qualification. If the Senate had merely declared the plaintiff unqualified without giving any reason or had made a plain legal mistake in judging plaintiff on any of his constitutional qualifications, we doubt that this court could

entertain jurisdiction of this matter. However, where the Senate has clearly placed itself on record by an action which can only be described as adding a new test for office in violation of the Constitution, its action is a nullity and entirely void. The action being null and void, it is the claim of plaintiff that he is now in the position where no action at all has been taken against him amounting to a judgment of his constitutional qualifications and he stands before the court as a Senator-elect who has been refused his legal right to have the oath of office administered to him. We claim that the defendant Lieutenant-Governor has a duty to administer the oath of office to the plaintiff; that the law requires him to perform this duty and that he has refused so to do.

POWER OF LEGISLATURE TO PRESCRIBE QUALIFICATIONS FOR A CONSTITUTIONAL OFFICE

The office of State Senator is created by the Constitution of the State of Michigan and the qualifications of a Senator are clearly set forth therein. Article V, Sec. 5 of the Constitution requires that each Senator shall be a citizen of the United States and a qualified elector of the district he represents. To be a qualified elector a State Senator must be above the age of 21 years and a resident of this State at least six months, as provided by Article III, Sec. 1 of the Constitution. The Constitution also has specifically acted on the question of who shall not be eligible for the office of State Senator by providing in Article V, Sec. 6 that no person holding any office under the United States or this State or any county office, except Notaries Public, officers of the militia and officers elected by townships, shall be eligible to have a seat in the Senate. The Constitution contains no provision granting the Legislature power to add further tests or qualifications for office of State Senator. It is the claim of the plaintiff that the

constitutional power given the Legislature to judge qualifications, elections and returns of its members (Article V, Sec. 15) only gives the Legislature the right to judge its members upon the qualifications required by the Constitution itself and is not a grant of power to the Legislature to made additional qualifications.

The law appears to be well established that when a state constitution names the qualifications for a constitutional office, the Legislature has no authority to prescribe additional qualifications. One of the latest expressions of this rule is set forth in the case of INBRIE v. MARSH (3 NJ 578, 71 A2d, ALR2d 241) wherein the court stated:

> "* * * if the Legislature may alter these oaths or any other provisions of the Constitution prescribing the qualifications for office (such as age, citizenship, residence and prohibition of dual office holding) it would be the extent of such variance nullify the Constitution. The maxim expressio unius est exclusio alterius, is peculiarly applicable here. Such has been the current not only of decisions in this State and elsewhere but of the authorities on public law. 'When the constitution prescribes the manner in which an officer shall be appointed or elect, the constitutional prescription is exclusive, and it is not competent for the legislature to provide another mode of obtaining or holding the office.' Johnson v. State, 59 NJL 535, 536, 538, 37 A 949, 950, 39 A 646, 38 LRA 373 (E. & A. 1896). * * * This line of constitutional construction is peculiarly appropriate in a government dependent on public elections and where by the Constitution 'all political power is inherent in the people,' Article 1, par. 3.
>
> "The recognized authorities on public law are in accord:
>
> It would seem but fair reasoning upon the plainest principles of interpretion, that when the Consti-

tution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From this very nature of such a provision the affirmation of these qualifications would seem to imply a negative of all others * * *. A power to add new qualifications is certainly equivalent to the power to vary them.' 1 Story, Commentaries on the Constitution Sec. 625.

'The legislature cannot add to the constitutional qualifications of an officer.' 1 Cooley on Constitutional Limitations, 140.

" 'It is obviously beyond the power of the legislature in prescribing the oath to be administered to impose upon the officer tests or requirements greater than those which the constitution has declared shall be sufficient.' Mechem on Public Offices and Officers 164 (1890)"

The same principle is also expressed in the following cases:

ANNOTATION in 47 A. L. R. at page 481.
State of Wisconsin v. Kohler 69 A.L.R. 348 at page 366.
42 Am. Jur., Public Officers, Sec. 38
Decon. Dig. Officers, Sec. 19.
In re Cuna 19 L.R.A. page 519 at page 528.

In the latter case it is stated that the House of Representatives is not the final judge of its own powers and privileges and where the enactments of the Legislature are not in conformity with the Constitution, the courts have the duty to treat such acts as null and void.

We believe that it requires no citation of authority on the proposition that the courts have the authority and duty to act where a Legislature takes action in violation of its state constitution. The reasoning is set forth plainly in 1 Cooley, Constitutional Limitations, page 105, where in

discussing the construction of state constitutions, the following language is used:

> "* * * The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative, and sometimes of executive acts. And as judicial tribunals have authority, not only to judge, but also to enforce their judgment, the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid through the enforcement of the paramount law in the controversy which has raised the question.
>
> "* * * The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or order, must be inoperative and void. * * *"
>
> Also see Marbury v. Madison, U.S.Sup. Ct. 1 Craneh 137, 2 Law, Ed. 60

While our research has not been completely exhaustive on the subject, we have been unable to find any case where a Legislature disqualified a member-elect for failing to meet qualifications other than set forth in the State Constitution. In every case we have examined wherein the language is used that a Legislature has the sole power to judge the "qualifications, elections and returns" of its members, such case was found to be based upon an issue of election. There are numerous authorities (49 *Am. Jur., States, Territories and Dependencies, Sec.* 34; *Annotation* 107 *A.L.R.* 205) wherein the statement is made that Legislatures are the sole and exclusive judge of the elections and qualifications of its own members, but in every case cited the issue was based in some form or other upon elections and the word "qualifications" was merely used as part of the general clause "qualifications, elections and returns".

The clause "qualifications, elections and returns" ap-

pears in the United States Constitution and it is apparent that it is the basis for such language in subsequent state constitutions.

In a text entitled "The Constitution and the Courts" by Thomas H. Calvert dealing with the constitution of the United States, it is stated in Volume 1 at page 362, with respect to the clause in the Federal Constitution dealing with the right of Congress to be "the judge of elections, returns and qualifications of its own members"—

> "It is doubtful if the Senate has the right to inquire as to the qualifications of one elected Senator beyond those prescribed by the Constitution".

The author cites cases we have been unable to find, as follows:—

> "What are the qualifications (in the text) • • • referred to the committee on elections? Clearly the constitutional qualifications, to-wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the state in which he shall be chosen." Maxwell v. Cannon, Smith El. cas. 182; Turney v. Marshall, 1 Bart. El. Cas. 167; Piggett, 1 Bart. El. Cas. 463.

At page 359 in said text, the following quotation from a case is used:

> "This House can only be 'the judge of the election, returns, and qualifications of its members;' that is, can judge whether each member has been elected according to the laws of his state and possesses the qualifications fixed by the Constitution. Here its power begins and ends." Smith v. Brown, 2 Bart El. Cas. 395.

The above constructoin of the word "qualifications" in the Constitution has been adopted, we believe, by implica-

tion by the Michigan State Legislature in former years. The offense for which the plaintiff has been disqualified was committed approximately eighteen (18) years ago and since that time the Michigan State Senate has twice seated him, in the year 1945 and 1947. While it is true that his seat was declared vacant in 1951, he did not appear at that time and request to be sworn.

The constitutional grant of power to the Legislature to judge the elections and returns of its members is plainly a broader grant of power and not circumscribed in any manner such as the power to judge the qualifications of its members. Furthermore the constitution (Const 1908 art 3 sec. 8) imposes the duty upon the Legislature to pass laws regarding elections. As we pointed out, such is not the case in regard to qualifications.

DID THE SENATE HAVE THE POWER TO BAR PLAINTIFF FROM TAKING HIS OATH OF OFFICE?

As disclosed by the Journal of the State Senate, action was taken by the Senators-elect to bar plaintiff, Anthony J. Wilkowski, from taking his oath of office prior to said senators being sworn in themselves. The Constitution provides, article 16, section 2, that members of the Legislature shall take their oath of office "before they enter on the duties of their respective offices". Section 2, P.A. 67 1877 (Stat Ann 1952 Rev. Sec. 2.32) provides that the senators shall proceed to the organization of their respective houses and that "no other business shall be in order until they shall have completed such organization". It is respectfully submitted that the action of the Senate in passing a resolution barring plaintiff from taking his oath, prior to their being sworn in themselves, was unlawful and a violation of the above provision of law.

It is further submitted that the oath taken by the plaintiff before a Notary Public was in accordance with the laws of this state and therefore a valid oath of office. Regulations providing for the oath to be administered by other officers at the organizational meeting are not exclusive and do not preclude a senator-elect from becoming qualified by other lawful means.

In conclusion, we submit that the Senate had no authority to make plaintiff meet a further test for office other than that required by the constitution and that its action in so doing was a nullity. We repeat that if the Senate had passed a resolution disqualifying the plaintiff for failing to meet any constitutional requirement, this court would be powerless to act even though it were plainly apparent that the Senate was absolutely wrong. However where the *only* action of the Senate consists in, not judging the qualifications of the plaintiff, but setting up an additional requirement and disqualifying plaintiff thereunder, it is in the position of not having acted at all. And the plaintiff is in the position of not having any judgment based upon his qualifications and being refused the right to take his oath of office. This court has the power to issue its Writ of Mandamus commanding defendant to perform his ministerial duty in administering the oath of office to plaintiff; that in so doing this court is not passing judgment upon an action taken by the Senate and in so doing it is not interferring with the right of the Senate to pass upon the qualifications of its members and in so doing it is not unlawfully interferring with the legislative branch of the Government. We believe that the claim of the plaintiff is legally sound and that the right to legal relief is clear. If the Senate had unlimited power for setting the qualifications for the office of Senator, a political party having a

bare majority could easily disqualify the entire opposite party from taking their seats. Such was not the intent of the framers of our constitution and such, we claim, is not the law today. It is respectfully submitted that plaintiff is entitled to a Writ of Mandamus as prayed for.

Respectfully submitted,

PHILIP J. NEUDECK,
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Detroit, Michigan.
FRANK P. NEATON,
Attorney for Plaintiff,
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Detroit, Michigan.

Dated at Detroit, Michigan.
January 18, 1955.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

ANTHONY J. WILKOWSKI,
Plaintiff

vs.

PHILIP A. HART, Lt. Governor of the State of Michigan,
Defendant

BRIEF OPPOSING PETITION FOR WRIT OF MANDAMUS

I

Concise Statement of the Matters Involved

The immediate question for decision is whether an order should issue commanding the lieutenant-governor of this State to show cause why he should not be compelled by writ of mandamus to administer the oath of office to one whose claim to the office of senator has been expressly rejected by the senate in exertion of its exclusive power to judge of the qualifications of its members, State Constitution, Article 5, & 15.

The facts, found in the journal of the senate, may be quickly stated:

On Wednesday, the 12th day of January, 1955, after the senate had convened, Senator Coleman gave notice that at the proper time that afternoon a resolution relative to the qualifications and seating of Senator-elect Wilkowski would be offered. Pending adoption of such resolution, it was moved "that the oath of office be not administered to said Anthony J. Wilkowski; and that he not be permitted to occupy his seat until such time as the senate shall judge of his qualifications." Mr. Wilkowski then offered his oath

of office sworn to before a notary public, and Senator Coleman moved that the senate reject the oath of office presented by Mr. Wilkowski. The previous question being ordered, the oath of office presented by Mr. Wilkowski was rejected (SJ 6, 7). And thereupon the motion that the oath of office be not administered to Senator-elect Wilkowski until the senate had judged his qualifications, prevailed (SJ 8).

The senators having been sworn in by the lieutenant governor, a resolution, preceded by a number of preambles, was offered (SJ 8-9). It provided:

> "Resolved, That Anthony J. Wilkowski be declared as unfit and unqualified to hold the office of state senator and that the seat from the second senatorial district of Michigan be declared vacant."

The resolution was referred to the committee on senate business which, on the same day, reported the resolution without amendment and with the recommendation that it be adopted. A majority of the senators-elect having voted therefor, the resolution was adopted (SJ 62).

It further appears from the petition, par. 18, p. 4, that on the 17th day of January, 1955, the plaintiff "again presented himself at the senate chamber and requested the defendant to administer to plaintiff the oath of office; that the defendant did refuse to administer the oath because of the action of the senators-elect and the senators on the motion and resolution aforesaid."

II

Reasons for Opposing

We appose the issuance of an order to show cause on the following grounds:

First

(1) If the practical objective of the pending petition

is indirectly to compel the Senate of this State to seat plaintiff as one of its members, then (a) since this Court cannot exercise powers properly belonging to another of the 3 departments of State government, Const 1908, Article 4, & 2, (b) since the lieutenant-governor of Michigan, as president of the senate, Const 1908, Article 6, & 19, possesses no power to judge of qualifications of members of senate, Const 1908, Article 5, & 15, and (c) since he is vested with no absolute power to override a motion or resolution of the senate judging such qualifications, or to perform an act forbidden by the senate, the writ of mandamus should not issue to force him to administer the oath of office to plaintiff.

(2) If the impractical objective or motive of the pending petition is to compel performance by the lieutenant-governor of this State, of a mere ministerial function, viz, the administration of the oath of office to plaintiff, issuance of the writ would be futile and ineffectual since the senate has already denied plaintiff a seat as one of its members.

Second

Plaintiff fails to show that the lieutenant-governor owes him a clear, specific positive duty created by law, or that plaintiff is vested with a clear legal right to the performance thereof, nor does he so allege.

1

1. If plaintiff is realistic and unmoved by purely political considerations, there can be no doubt that what he seeks by indirection to accomplish is to compel the senate of this State to seat him as one of its own members. He might just as well attempt to obtain from this Court a writ of mandamus addressed to the senate itself.

(a) Article 4, & 1 of our State Constitution, divides the powers of government into three departments, the legislative, executive and judicial, while & 2 provides that "no person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."

This Court in an early decision written by Mr. Justice Cooley, *Sutherland v. The Governor,* 29 Mich. 320, 325, declining, for lack of jurisdiction, to entertain an application for mandamus to direct the governor to issue his certificate as required by legislation relating to a ship canal and harbor, had this to say with respect to the division of powers of government:

"It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest."

Then, after discussing such checks and balances, the Court continues:

"It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is its equal.

"It has long been a maxim in this country that the legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist; and if the legislature could in like manner

override executive action also, the government would become only a despotism under popular forms. *On the other hand it would be readily conceded that no court can compel the legislature to make or to refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the duty to take it be made ever so clear by the constitution or the laws. In these cases the exemption of the one department from the control of the other is not only implied in the framework of government, but is indispensably necessary if any useful apportionment of power is to exist.*"

It follows from this authority, we respectfully submit, that no power resides in this Court enabling it to issue a judicial mandate forcing the senate, as a part of a coordinate branch of the government of this State, to accept into its membership one who claims thereto have been rejected by that legislative body.

As was said in a later case,

Attorney General, ex rel. Beers v. Board of Canvassers, 155 Mich 44, 46

"Section 9 of article 4 of the State Constitution (1850) has made the State senate the sole judge of the 'qualifications, elections and returns of its members.' This court can neither determine a *basis* for its decision nor review it when made." (Emphasis added.)

(b) The senate of this State, in exertion of its exclusive power to judge the qualifications of its members, Const 1908, Article 5, & 15, has refused to permit the oath of office to be administered to the plaintiff (SJ 7), and it has, by resolution duly adopted (SJ 8, 9, 62), declared him unfit and unqualified to hold the office of state Senator

and that the seat from the second senatorial district of Michigan, is vacant.

The lieutenant governor of Michigan, by virtue of his office, is authorized to perform the powers and duties of the office of governor in certain contingencies, Const 1908, Article 6 & 16, and he "shall be president of the senate, but shall have not vote," Const 1908, Article 6, & 19. Certainly, he is vested with no power to pass upon the qualifications of members of the legislative body over whom he presides. Nor can it be successfully contended that he is in position to ignore or override a motion of the senate which expressly forbids the taking of an oath of office. And in refusing so to do in defiance of the wishes of the senate, he merely recognized his constitutional limitations.

(c) Such constitutional limitations upon the authority of the lieutenant governor, is further emphasized by the axiom that a writ of mandamus will not issue unless it clearly appears that the person to whom it is directed has the *absolute* power to execute it. Thus, in an early case,

Turnbull v. Giddings, 95 Mich 314,

relators (members of the house and senate) applied for mandamus to compel the lieutenant governor, the secretary of the senate, the speaker of the house, and the house clerk, to receive and enter upon the journals of their respective bodies, certain protests on the part of relators against the passage of a certain resolution. In each instance, the presiding officer had ruled the protest out of order, and each such ruling was sustained by the legislative body. The Court pointed out that the duty of keeping a journal was by the Constitution imposed upon the senate and house of representatives, and not upon the president and secretary of the senate and the speaker and clerk of the house. The

duty of keeping the journal, imposed by the rules upon the secretary and clerk, was ont a delegation of the control of the journal to either of them, and they could not enter upon it such matter as the senate and house determined should be placed thereon.

Speaking through Mr. Justice McGrath, the Court said: "The writ of mandamus neither creates nor confers authority upon the officer to whom it is directed. It merely directs the exercise of existing powers. It should be directed to those who are to execute it, or whose duty it is to do the thing required. It must also clearly appear that the person to whom it is directed has the power to execute it; otherwise, it will not be issued. Mos. Mand. 199; High, Extr. Rem. & 32; Merrill, Mand. & 57, 58, 60, and cases cited.

"The duty sought to be enforced is imposed by the Constitution upon the Senate and House, and, those bodies having refused to receive or enter the protests, neither the president of the Senate nor the speaker of the House has the power, without the concurrence of the body over which he presides, to execute the order if made."

So in the case at bar, since exclusive power to judge of the qualifications of its members is vested in the senate, the president of that body possesses no authority to reverse its decisions or override its orders, motions or resolutions with respect to the qualifications of senators.

Such being the situation, the writ of mandamus should not issue to compel the lieutenant governor to disobey the express orders or to ignore a motion or resolution of the body over which he presides.

2. But, it is urged, the act of administering the oath of office is purely ministerial and as such is subject to the mandate of this Court.

Even though this be true, it is perfectly plain from the face of plaintiff's petition that even though the writ should issue compelling the defendant to administer the oath of office, compliance with this Court's mandate would be but an idle and useless ceremony, for the senate would still refuse to recognize plaintiff as one of its members. And the writ of mandamus will not issue to compel the doing of a vain and useless thing,

Quandt v. Schwass, 186 Mich. 433.

Plaintiff is not a member of the senate and he has been barred from taking the seat reserved for a senator from the second district. By virtue of a motion duly adopted he has been forbidden to take the oath and by virtue of a resolution, the seat has been declared vacant. Clearly then if he should taken such an oath, in disobedience of the express order of the senate, it would avail him absolutely nothing.

2

Moreover, plaintiff fails to demonstrate in his petition for writ of mandamus that the lieutenant governor owes him a clear duty described or created by law.

"No mandamus can issue to a state officer to compel him to perform any but some unquestionable and legally defined duty."

Bresler v. Butler, 60 Mich. 40, 42.

It has long been the rule of this Court that the writ of mandamus is designed to enforce a plain, positive duty, upon the relation of one who has a clear legal right to have it performed,

Toan v. McGinn, 271 Mich. 28, 33.

The primary purpose of the writ is to enforce duties created by law,

> *McLeod v. State Board of Canvassers,* 304 Mich. 120, 125;
>
> *Kosiba v. Wayne County Board of Auditors,* 320 Mich. 322, 326.

"This Court has said on numerous occasions that to award writs of mandamus to plaintiffs, they must have a clear legal right to performance of the specific duty sought to be compelled, and the defendants must have the clear legal duty to perform such act."

> *Janigan v. City of Dearborn,* 336 Mich. 261, and cases cited, 264.

Plaintiff's counsel have in their brief cited no constitutional or statutory provisions requiring the lieutenant governor to administer oaths of office to senators.

The Revised Statutes of 1846, Chap 2, & 4 Stat Ann 1952 Rev Vol 2, & 2.63), is couched in permissive rather than mandatory terms, provides:

> "Sec. 4. The oath of office of any member or officer of the senate or house of representatives, *may* be administered by, and taken and subscribed before the chancellor, any justice of the supreme court, the lieutenant-governor, the president pro tempore of the senate, or the speaker of the house of representatives."

Traditionally, of course, the oath is taken by senators before the lieutenant-governor, but no specific duty is imposed by this enactment upon the latter to administer such an oath under any and all circumstances and conditions. It is not a mere ministerial duty in any event

since a certain amount of discretion is vested in him. And certainly such a duty is not created by law or required to be performed in the face of a senatorial motion or resolution forbidding the ceremony.

III

Relief

We therefore respectfully submit that it clearly appears from the face of plaintiff's petition that he is entitled to none of the relief sought in these mandamus proceedings.

THOMAS M. KAVANAGH,
Attorney General of Michigan.
By /s/ EDMUND E. SHEPHERD,
Solicitor General.
By /s/ DANIEL J. O'HARA,
Assistant Attorney General.

APPENDIX E

STATE OF MICHIGAN
IN THE SUPREME COURT

ANTHONY J. WILKOWSKI,
Plaintiff

vs.

PHILIP A. HART, Lt. Governor
of the State of Michigan,
Defendant

REPLY TO DEFENDANT'S BRIEF

In plaintiff's brief, in support of his petition for a Writ of Mandamus, he stated what appears to be the well established law that where a state constitution names the qualifications for a constitutional office, the Legislature has no authority to prescribe additional qualifications, and plaintiff supported his argument by citations from judicial opinions and authorized text. From the fact that defendant, in his brief, is silent on this statement, we conclude he agrees it is well established law. Plaintiff further contends that since no other constitutional grounds for disqualification exist and plaintiff having been regularly certified as the senator-elect, defendant is without discretion in the matter and it is his legal duty, in accordance with the statute, to perform a ministerial act by administering the oath of office to plaintiff.

> "*Oath of member, who may administer.* Sec. 4. The oath of office of any member of or officer of the senate or house of representatives, may be administered by, and taken and subscribed before the chancellor, any justice of the supreme court, the lieutenant-governor, the president pro tempore of

the senate, or the speaker of the house of representatives." Stat Ann 1952 Rev. sec 263 (L.C. 1948 sec 4.85)

While the general principle is well settled that the court will not issue a Writ of Mandamus to compel an officer of a State Legislature to exercise legislative functions or perform duties involving the exercise of discretion, it is nevertheless well settled that mandamus will issue to direct the performance of a public duty which the law clearly and peremptorily imposes, where there is no discretion in the officer to act or refuse, and the courts practically uniformly hold that the cloak of immunity shielding the legislative branch of the Government from interference from the judicial department does not extend to duties of a merely ministerial character involving no legislative discretion.

See State of Missouri Ex Rel. Donnell v. Osburn 136 *A.L.R.* 667 *with annotation.*
Kavanaugh v. Chandler. 255 *Ky.* 182; 95 *A.L.R.* 273
Presiding Officers. 34 *Am. Juris. page* 911

In State of Missouri Ex Rel. Donnell v. Osborne, supra, wherein the Speaker of the House of Representatives was required under a constitutional provision to open and publish the returns of an election for the office of Governor and declare the result of such election, and where the Speaker declined to publish the returns and declare the election of the Governor because the action of a majority of the joint assembly ordered him not to do so, the court in issuing its Writ of Mandamus against the Speaker, said:

"Nor does the office occupied by respondent as speaker of the House put him beyond the jurisdiction of mandamus. In Marbury v. Madison, 1 Cranch

137, 170 2 L ed. 60, Chief Justice Marshal declared that 'it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined.' This Court followed that rule in effect in State ex rel. Robb -v- Stone, 120 Mo 428, 25 SW 376, 23 LRA 194, 41 Am St. Rep 705. There we refused to issue mandamus against the governor on the ground that the performance of every duty placed upon the governor, who has 'supreme executive power,' involved the exercise of executive duty and discretion with which this court could not interfere. In no way would we be interfering in this case with the legislative power conferred on the legislature by issuing our writ since the nature of the thing to be done involves neither legislative duty nor discretion. If either were involved we could not interfere because of the constitutional separation of powers which we must and we do uphold.

Our conclusion is that the speaker is an officer to whom we may propertly direct our writ to command the performance of the ministerial duty involved.

Defendant argues that in compelling him to administer the oath of office to plaintiff that such action is the same as ordering the State Senate by writ of mandamus to seat plaintiff, and then proceeds to direct the court's attention to the division of powers in the three departments of State Government. Plaintiff respectfully draws the court's attention to the distinction between the performance of a ministerial act, as provided by law, to-wit, the administration of the oath to plaintiff, and the exercise by a legislative officer of his legislative functions in the performance of duties involving the exercise of discretion. In the light of the above decisions, plaintiff respectfully submits that if the court found that he had com-

plied in entirety with all the constitutional qualifications of office and that all that remained to be done was the administration of the oath by a state officer empowered by law to administer it, such action would be purely ministerial, not discretionary, nor part of the legislative functions of said officer, and within the power of the court to issue its writ of mandamus without infringing upon another sovereign division of Government.

Defendant quotes from *Sutherland v. The Governor*, 29 Mich. 320. Plaintiff has diligently studied the case and respectfully submits that it is not in opposition to plaintiff's contention. No one denies that the Governor in the exercise of his duties, is immune from interference by the judiciary and that a writ of mandamus will not issue against him. By virtue of his office, he holds supreme executive power and is as independent in the exercise of the functions of his office from coercion or interference as are the two other sovereign divisions of the Government in their functions. Judge Cooley in his opinion in the Sutherland case supra laid down the rule that it is impossible to distinguish, as far as office of Governor is concerned, between purely ministerial acts and discretionary acts and held that as far as judicial process is concerned, all his acts are to be considered discretionary and his judgment unhampered.

No one denies defendant's statement, which he alleges follows from the authority he quotes in the Sutherland case, that "no power resides in this court enabling it to issue a judicial mandate forcing the Senate, as a part of a coordinate branch of the government of this state, to accept into its membership one whose claims thereto have been rejected by that legislative body". Plaintiff's contention, he is forced to repeat, is that the defendant is legally bound to perform the ministerial act of admini-

stering the oath to plaintiff as provided by law and no infringement by the judiciary on the powers of the legislature results thereby. Plaintiff further desires to call particular attention to the langauge of Justice Cooley in *Southerland v. Governor* supra at pages 327 and 328, to the effect that chief officers of state below the office of Governor are subject to the process of this court in the performance of this ministerial duties.

> "*Lieutenant Governor*—The Lieutenant Governor is not clothed with the same immunity from mandamus as the governor, and it is immaterial that he may on the happening of contingencies succeed to the office of governor. It has been held that mandamus will lie at the instance of the attorney general to compel the president of the senate of a state to assume the office of governor, when the same is vacant." *Attorney General v. Taggart,* 66 NH 362, 29 A 1027, 25 LRA 619. 34 Am. Juris page 142.

Plaintiff does not contend that the Lieutenant Governor is empowered to pass upon the qualifications of members of the legislative body over whom he presides; nor does he deny the exclusive power of the Senate to judge the constitutional qualifications of its members, as defendant infers in his brief; nor would a writ of mandamus convey such power. As plaintiff said in his brief, the Senate has the sole and exclusive power of judging the qualifications of its members, but only such qualifications as are set forth in the Constitution.

The case of *Turnbull v. Giddings,* 95 Mich. 314 cited by defendant in support of his position, has no application to the present case. The Supreme Court expressly held in that case that the duties in question were imposed by the constitution "upon the house, and not upon the president or speaker, secretary or clerk".

Defendant, however, contends that even if the act of administering the oath to plaintiff is purely ministerial and obligatory under the statute, compliance with the court's mandate would be an idle and useless ceremony for the reason that the Senate would still refuse to recognize plaintiff as one of its members. He further states that a writ of mandamus will not issue to compel the doing of a vain and useless thing, and with this statement of law plaintiff agrees. Plaintiff, however, does not agree with his conclusion. First of all, it is to be presumed that the Senate will conform with the opinion of this court if this court should so find that the qualification created by the Senate, upon which they judged the plaintiff, was a nullity and that the writ of mandamus should issue. And, secondly, the failure or refusal of the senate to seat plaintiff, after compliance with the writ by the Lieutenant Governor, should in no way stop the issuance of the writ if in conformity with law. The mandatory power of the writ goes only to the compelling of the Lieutenant Governor to perform a ministerial act imposed upon him by law. Subsequent action on the part of the Senate is not involved.

In conclusion we submit the *Revised Statutes of* 1846, *Chap.* 2, *Sec.* 4 (*Stat Ann* 1952 *Rev Vol* 2, *Sec.* 2.63) relative to the right of the plaintiff to take the oath of office, are not couched in permissive terms, as claimed by the defendant in his brief. The statute in question does not merely state that the Lieutenant Governor among others *may* administer the oath of office to any senator, but also clearly states "that the oath of office of any member or officer of the senate ***, may be administered by, and *taken and subscribed before* *** the Lieutenant Governor ***". We contend that this statute gives plaintiff a clear legal right to take his oath before the Lieutenant Governor and conversaly imposed upon the Lieutenant Governor the

duty to give the oath, as stated in 18 *R.C.L. page* 259, *Sec.* 184:

> "* * * Where the person entitled to a public office is required by law to take an oath of office, the correlative duty imposed upon another officer to administer such oath is ministerial, and he may be compelled to perform such duty by mandamus * * *"

Similar language is used in 35 Am Jur Mandamus, Sec. 228:

> "* * * Accordingly, the duty imposed upon an officer to administer an oath, to one elected or appointed to office, being ministerial, may be enforced by mandamus."

In a case cited under the last quotation *Fox v. McDonald* 101 Ala 51, 21 LRA 529), it was held that the duty of a mayor of a city to administer the oath of office to one elected to the office of chief of police, was a purely ministerial duty enforceable by mandamus. We submit that plaintiff is now in the same position as a man who has been elected to the Senate, for instance, by a special election and has approached the rostrum of the Senate chamber and stands before the Lieutenant Governor asking to be sworn in.

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[illegible]

October Term, 1954

No. [illegible] 59

ANTHONY WILKOWSKI

Appellant,

v.

PHILIP A. HART
Lieutenant Governor
of the State of Michigan

Appellee.

On Appeal from the Supreme Court
of the State of Michigan

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 765

ANTHONY WILKOWSKI

Appellant,

v.

PHILIP A. HART
Lieutenant Governor
Of the State of Michigan

Appellee.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS APPEAL

The appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the following grounds:

(a) The three questions stated in the Notice of Appeal, Appendix 1, raise no federal question and since under Rule 10 of the Revised Rules only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the Court, the appeal herein must of necessity fail.

(b) Appellant seeks to have this Court take jurisdiction of a political question notwithstanding that this Court has determined that an unlawfu' denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the Due Process Clause.

ARGUMENT

This appellant did not present, nor did the court below pass upon the Federal questions which they now allege to exist. Accordingly, they have not reserved the right to raise them now. A mere reading of the questions set forth in the Notice of Appeal suffices to demonstrate a total lack of a federal question of substance for the consideration of this Court.

This Court will note that the Court below in its Order, Appendix A, (14-15-16) held that plaintiff's petition in effect challenges the action of the Senate of the State of Michigan acting in its Sovereign capacity as part of the law-making department of the State Government, and under the settled law of this State the Court is without authority to direct or control such action by a writ of mandamus (citing cases).

This Court has also noted its inability to act where a political question is involved. In *Snowden* v. *Hughes, et al.*, 321 U. S. 1, 7, it is said:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall* v. *Beckham*, 178 U. S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave* v. *Newell*, 246 U. S. 650, as we reaffirm it now."

This Court in *Barry, Sergeant-At-Arms of the United States Senate, et al.*, v. *United States Ex Rel Cunningham*, 279 U. S. 597, syllabus 2, held:

> "Exercise by the Senate of its judicial power to judge of the elections, returns and qualifications of its members, const., Art. 1, § 5, cl. 1, necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel answers to pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review."

And the United States Court of Appeals for the District of Columbia, in *Sevilla* v. *Elizalde*, 112 F2d 29, 38, said:

> "We are cited to no cases, and we find none, in which the Federal courts have even been asked to determine the qualifications of a member of Congress. Apparently it has been fully recognized that that power is lodged exclusively in the legislative branch. Under parallel provisions in state constitutions giving state legislatures the power to determine the qualifications of their members, it is ruled that the legislative power is exclusive—that the courts have no jurisdiction. *Reif* v. *Barrett* (1933) 355 Ill. 104, 188 N.E. 889; *Greenwood* v. *Board of Registrars of Voters of City of Fitchburg* (1933) 282 Mass. 74, 184 N.E. 390; *Dinan* v. *Swig* (1916) 223 Mass. 516, 112 N.E. 91; *Covington* v. *Buffett* (1900) 90 Md. 569, 45 A. 204, 47 L.R.A. 622; *Attorney General* v. *Board of Canvassers of Seventh Senatorial District* (1908) 155 Mich. 44, 118 N.W. 584; *Dalton* v. *State* (1885) 43 Ohio St. 652, 3 N.E. 685; and see Note (1937) 107 A.L.R. 205, 209."

And this Court has consistently ruled that it will be bound by the interpretation given to a state statute by the highest court of that state. *Barsky* v. *Board of Regents*,

347 U. S. 442, 448; *Winters* v. *New York*, 333 U. S. 507, 514; *Greenough* v. *Tax Assessors of City of Newport*, 331 U. S. 486; *Mooley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed.

Thomas M. Kavanagh
Attorney General

Edmund E. Shepherd
Solicitor General

Daniel J. O'Hara
Assistant Attorney General

Counsel for Appellee

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Lansing 2, Michigan.

Appendix 1.

Copy of Notice of Appeal filed with Clerk of Michigan Supreme Court Feb. 2, 1955.

[Entitled in Court and Cause]

I. Notice is hereby given that Anthony J. Wilkowski, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan dismissing plaintiff's petition for writ of mandamus, entered in this action on January 28, 1955.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Petition for writ of mandamus.
2. Plaintiff's brief in support of petition for writ of mandamus.
3. Brief opposing petition for writ of mandamus.
4. Reply to defendant's brief.
5. The opinion of the Court as pronounced in this cause on January 28, 1955.
6. This designation of record.

III. The following questions are presented by this appeal:

1. Whether the admitted facts apparent from the face of the record demonstrating that plaintiff below had been duly and legally elected to the office of State Senator; was duly certified in the manner and means provided by law as having been so elected; was possessed of each and every of the constitutional requirements qualifying him for said office; was a person who had prior to such election been convicted of a felony in the State of Michigan; was entitled as matter of right and law to be sworn in at the organization meeting of the Senate elected along with him without challenge.

2. Whether a purported resolution offered to a group of Senators elect, not yet having taken the oath of office nor being yet constitutionally organized can support, in law, any action, judgment or determination taken under said purported resolution.

3. Whether the qualifications for the aforesaid office, having been enumerated and determined by the said constitution, subsequent statutory legislation prescribing a new and different test is constitutional or null and void.

/s/ Anthony J. Wilkowski
Address 8309 Wallace Ave.
Detroit, Mich.
Pro per

JUN 20 1955
HAROLD B. WILLEY, Clerk

No. [redacted] 59

IN THE

Supreme Court of the United States

October Term, 1954

ANTHONY J. WILKOWSKI
Appellant,

v.

PHILIP A. HART
Lieutenant Governor
Of the State of Michigan
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

October Term, 1954

No. 765

ANTHONY J. WILKOWSKI
Appellant,

v.

PHILIP A. HART
Lieutenant Governor
Of the State of Michigan
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellee pursuing the theory appellant prays a ruling on a political question; that appellant asserts a property right in the office considered; and finally depending upon an alleged interpretation of the Statute in question by the Court below has presented a brief upholding those contentions.

However, those contentions are no part of the case made by appellant on the record here or below.

The appellant does not contend that he has a property right to state political office. He asserts that he is qualified for the office of State Senator by the express qualifications of the Constitution of the State of Michigan and

that the electorate of the 2nd. Senatorial District of the State had the right to vote for him and elect him to that office. That, upon being elected thereto, he had the right to serve in the Senate of the State of Michigan. That any statute enacted by the legislature of Michigan which attempted to add to the qualifications for State Senator specifically provided in the Michigan Constitution was invalid and of no effect in its operation against him. That to hold such a statute to be effective against him, as a duly elected State Senator, would be contrary to Amendment 14, Section 2, of the United States Constitution, in that it would amount to an abridgement of the right of electors to vote for members of the Michigan Legislature.

This appeal comes under the provisions of 28 U.S.C., 1257 (2), as stated in the Notice of Appeal. "The Federal Supreme Court is concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state." (249 U.S. 427). Also, as stated in *Standard Oil Co.* v. *Graves,* 249 U.S. 389,: "While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which is asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

The question presented in this appeal is not political. It is a question of constitutionally vested rights. The right of an electorate to vote for a constitutionally qualified candidate and elect him to serve for them as well as the right of that candidate to represent that electorate after being lawfully elected. A state legislature can-

not take away those rights by adding to the constitutionally provided qualifications for an office. Cooley, in his 4th edition of Constitutional Limitations, p. 78, expressed the legal principle as follows:

> "When the constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases."

Obviously the Michigan legislature added to the qualifications of a State Senator when it enacted the "felony" statute (6.676 Mich. State Ann.). It thereby abridged the right to vote for members of the Legislature of Michigan, contrary to Amendment 14, Section 2, of the Constitution of the United States.

In respect to the appellee's contention that the subject matter of this appeal is not properly within the jurisdiction of this Court, the appellant again refers to *McPherson* v. *Blacker,* 146 U.S. 1, wherein it is stated (pp. 23, 24) as follows:

> "It is argued that the subject-matter of the controversy is not of judicial cognizance because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies. . . ."
>
> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained."
>
> "The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might

> be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

In reply to the appellee's averment that this appeal raises no federal question since none is presented in the Notice of Appeal, the appellant contends that the "felony" statute (6.676 Mich. Stat. Ann.) has been and now is in issue since the day the appellant sought to take the oath of office for State Senator. That the said statute is properly subject to the judicial notice of any court considering the appellant's cause of action. The question of the validity of that statute is a "subsidiary question fairly comprised therein", as required under Rule 10, sec. 2, of the Revised Rules of this Court.

The question of the Michigan Senate being the sole judge of the "elections, returns, and qualifications of its members", is not pertinent to this issue if the statute under which the Michigan Senate disqualified the appellant is invalid as to its operation against the appellant. The Senate made that statute its sole ground for his disqualification. In any event the constitutional power of the Michigan Senate to be the sole judge of the qualifications of its members is the same as that of the United States Senate and House of Representatives. That power was correctly defined in *Smith* v. *Brown*, 2 Bart. El. Cas. 395, as follows:

> "This House can only be 'the judge of the election, returns, and qualifications of its members;' that is, can judge whether each member has been elected according to the laws of his state and possesses the qualifications fixed by the Constitution. Here its power begins and ends."

That interpretation was followed in *Maxwell* v. *Cannon*, Smith El. Cas. 182, and in *Turney* v. *Marshall*, 1 Bart. El. Cas. 197. It has been upheld by action of the United States Senate in instances too numerous to cite,

but noteworthy of study are the expulsion cases brought against Senators Smoot and Arthur R. Gould.

The evil consequences which could result should our Constitution be construed to mean that the Senate and House could set up their own qualifications for membership, over and above those set up by the Constitution, are too apparent for comment. Equally disastrous could be state legislature action along the same lines.

The Supreme Court of Michigan, in its opinion of January 28, 1955, denied the appellant the relief he sought but was silent as to the constitutionality of the Michigan statute upon which the Michigan Legislature disqualified the appellant. That statute (6.676 Mich. State Ann.) was properly in contention as shown by the record before this Court. Specific reference is hereby made to Appendix B, pages 20, 21, wherein is set forth Senate Resolution No. 1. The law is established to the effect that even though a state court did not refer to a constitutional question in its opinion, that constitutional question is nevertheless subject to the jurisdiction of the United States Supreme Court when the record shows that it has been raised in the state court. (*International Harvester Co.* v. *Missouri,* 234 U.S. 199, 52 L.R.A., N.S. 525).

CONCLUSION

Appellant urges that the Court enter its Order herein dismissing the Motion to Dismiss filed by appellee and futher Orders that a hearing of the case on the merits be required.

Respectfully submitted.

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